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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 91

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PERRY HALSETH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

FILED JUNE 2, 1951.
PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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a [Caption omitted]

1 In the United States District Court for the Eastern District of Wisconsin

No. 211 Crim. T.

UNITED STATES OF AMERICA

v.

PERRY HALSETH

(Former Section 336, Title 18 U.S.C., Now Section 1302, Title 18, U.S.C.)

INDICTMENT—Filed May 9, 1949

The Grand Jury charges:

That on or about the 1st day of June 1948, at Green Bay, Brown County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court, PERRY HALSETH, knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Second Count

The Grand Jury further charges:

That on or about the 12th day of May 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the first count of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Jos. T. Kluchesky a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Third Count

The Grand Jury further charges:

That on or about the 10th day of June 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH,
2 the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause

to be delivered by mail to George Koch a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Fourth Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to George Koch, Jr. a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Fifth Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Susan Likert a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

3 Sixth Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Wauwatosa, Milwaukee County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Richard D. Lutz a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Seventh Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Milwaukee, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court, PERRY HALSETH, the identical person

named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to John Owen a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Eighth Count

The Grand Jury further charges:

That on or about the 27th day of March 1948 at Lake Geneva, Walworth County, in the State and Eastern Judicial District
4 of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Herman Stafford a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

A True Bill.

HARRY HURST,
Foreman.

E. J. KOELZER,
Assistant United States Attorney.

[File endorsement omitted.]

5 [File endorsement omitted]

In the United States District Court

[Title omitted]

MOTION TO DISMISS

To: The Honorable Robert E. Tehan
Judge of the United States District Court
for the Eastern District of Wisconsin

Now comes the defendant, Perry Halseth, by his attorneys, and moves for an order dismissing the indictment herein, as a whole and on every count thereof, separately and severally, on the grounds to be shown to the Court at the hearing hereon, and assigns, among other reasons, the following grounds, separately and severally, for such motion, to-wit:

I. The said indictment charges no offense against the laws of the United States of America;

II. The said indictment does not set forth accurately and clearly every ingredient of the offense sought to be charged.

III. The said indictment is vague, uncertain, indefinite, and does not advise defendant of what he is required to meet, and does not contain facts sufficient to enable him to prepare his defense to said indictment or to plead the said indictment and the conviction or the acquittal thereof or thereunder as jeopardy against a subsequent indictment;

IV. The circular letter referred to in each and every count of the indictment is not pleaded with sufficient particularity to apprise the defendant as to the information contained therein alleged to concern a lottery or scheme offering a prize dependent upon lot or chance;

V. A true copy of said circular letter which will be pro-
6 duced to this Court at the hearing hereon will show to the Court that the matter alleged to have been deposited or caused to be deposited in the mails by defendant did not concern "any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance" as proscribed by the statute sought to be invoked in said indictment, but said letter merely refers to a so-called punch card with a description thereof which card at the time of mailing and delivery was solely a piece of cardboard with certain printing thereon with perforations therein which did not represent or purport to represent any ticket, chance, share or interest in and dependent upon a lottery for the reason that no such lottery has been inaugurated, set up or put in operation or was in existence at such time and that none such might ever be inaugurated, set up or put into operation by any one by the use of such card and that if, as and when such card might be set up in the future so as to conduct a lottery and used for such purpose, such lottery would be operated outside of the mails in local jurisdictions by parties other than the defendant, with defendant taking no part in and not being connected in any way with such operation, said card showing that after the operation of a lottery by use thereof, if, as and when it might be conducted, the operator thereof, if he accepted payments for purchases, which under the language on the card are optional, the operator could use as prizes any merchandise procured from any source.

VI. The said indictment is a mere conclusion of the pleader.

Dated at Milwaukee, Wisconsin, this 6th day of July, 1949.

Respectfully submitted,

NASH & DONNELLY, of Washington, D. C.
BITKER & MARSHALL

by BRUNO V. BITKER,
Attorneys for Defendant,
208 East Wisconsin Avenue,
Milwaukee 2, Wisconsin.

In the United States District Court

[Title omitted]

STIPULATION IN RE MOTION TO DISMISS—Filed July 25, 1949

IT IS STIPULATED by and between the parties, by their respective attorneys, that for the purpose of the hearing on defendant's motion to dismiss the indictment herein, and for no other purpose, that:

1. The statute referred to by the government in each count of the indictment is Section 1302, Title 18, U.S.C., Former Section 336, Title 18.

2. The circular letters referred to in counts 1, 2, 7 and 8 are identical with the letter and other exhibits attached hereto and marked Exhibits R, R-1, R-2, R-3, R-4 and R-5.

3. The circular letters referred to in counts 3, 4, 5 and 6 are identical with the letter and other exhibits attached hereto and marked Exhibits C, C-1, C-2, C-3, C-4 and C-5.

4. Said defendant did cause to be delivered by mail the circular letter thus described in each count to the person named in each count at or about the dates indicated.

Dated at Milwaukee, Wisconsin, this 11th day of July, 1949.

For the United States of America:

E. J. KOELZER,
Asst. United States Attorney.

For the Defendant Nash & Donnelly:

BITKER & MARSHALL,
by BRUNO V. BITKER.

[File endorsement omitted.]

PERRY SALES COMPANY
417 S. Jefferson St.
Chicago 7, Ill.

EXHIBIT "R"

7a

Perry SALES COMPANY

417 S. JEFFERSON STREET
CHICAGO 7, ILLINOIS

FOR YOU—A NEW, PERSONAL SUPERHETERODYNE RADIO AS A GIFT—

You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. The quality features are described on the enclosed folder.

It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.

The enclosed sales card has a list of names and under each seal is a number. For example—Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

Take ADVANTAGE NOW OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you TWO (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case for your Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY

P. S. Should you be unable to take advantage of this offer we would appreciate your co-operation in turning the enclosed over to a reliable friend. THANK YOU!

7b

EXHIBIT "R-2"

7c

EXHEIT "R-3"

993 J

Use This Order Blank

PERRY SALES COMPANY

417 S. Jefferson St., Chicago 7, Ill.

ASE SHIP AT ONCE TO

Name_____

Address_____ Zone_____

City_____ State_____

2 TRAV-LER RADIOS

☐ IVORY AND BLUE ☐ IVORY AND RED
☐ ALL IVORY ☐ ALL WALNUT

and THREE Rolpoint Ball Pens

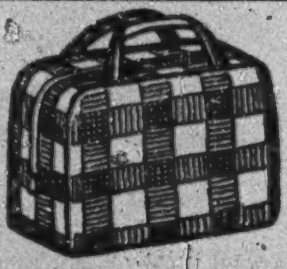
REMITTANCE ENCLOSED

☐ $29.95 PAYMENT IN FULL
☐ $2.00 DEPOSIT, BALANCE C.O.D.
☐ SHIP C.O.D. FOR FULL AMOUNT

Extra Gift

If you send your order in 15 days, you receive a

SMART ZIPPER CARRYING CASE



Mark X here ☐ If you are to receive carrying case.

NOTICE — If you enclose cashier's check or money order in full, you save paying C.O.D. fees and we prepay all shipping charges.

7d

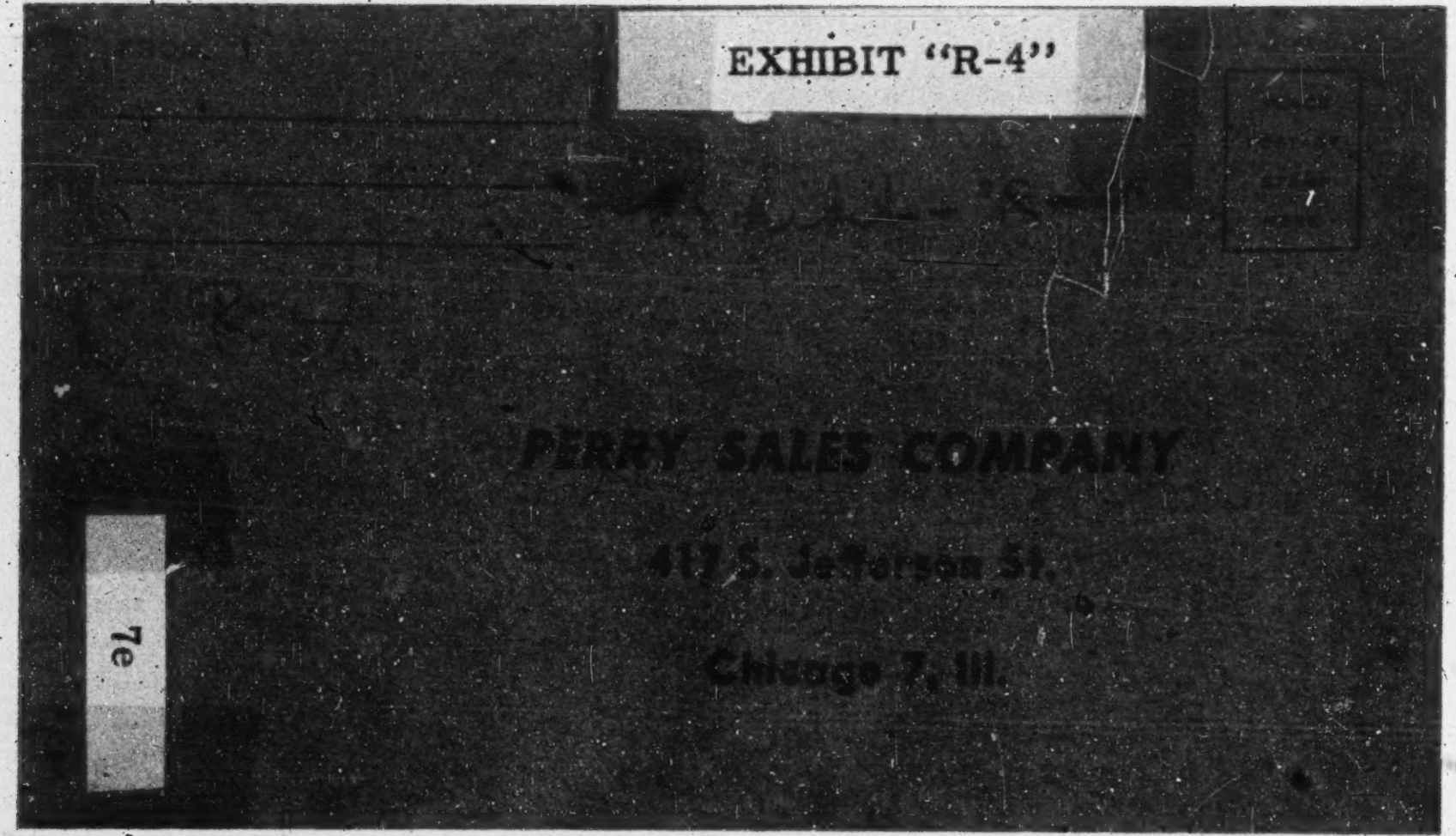
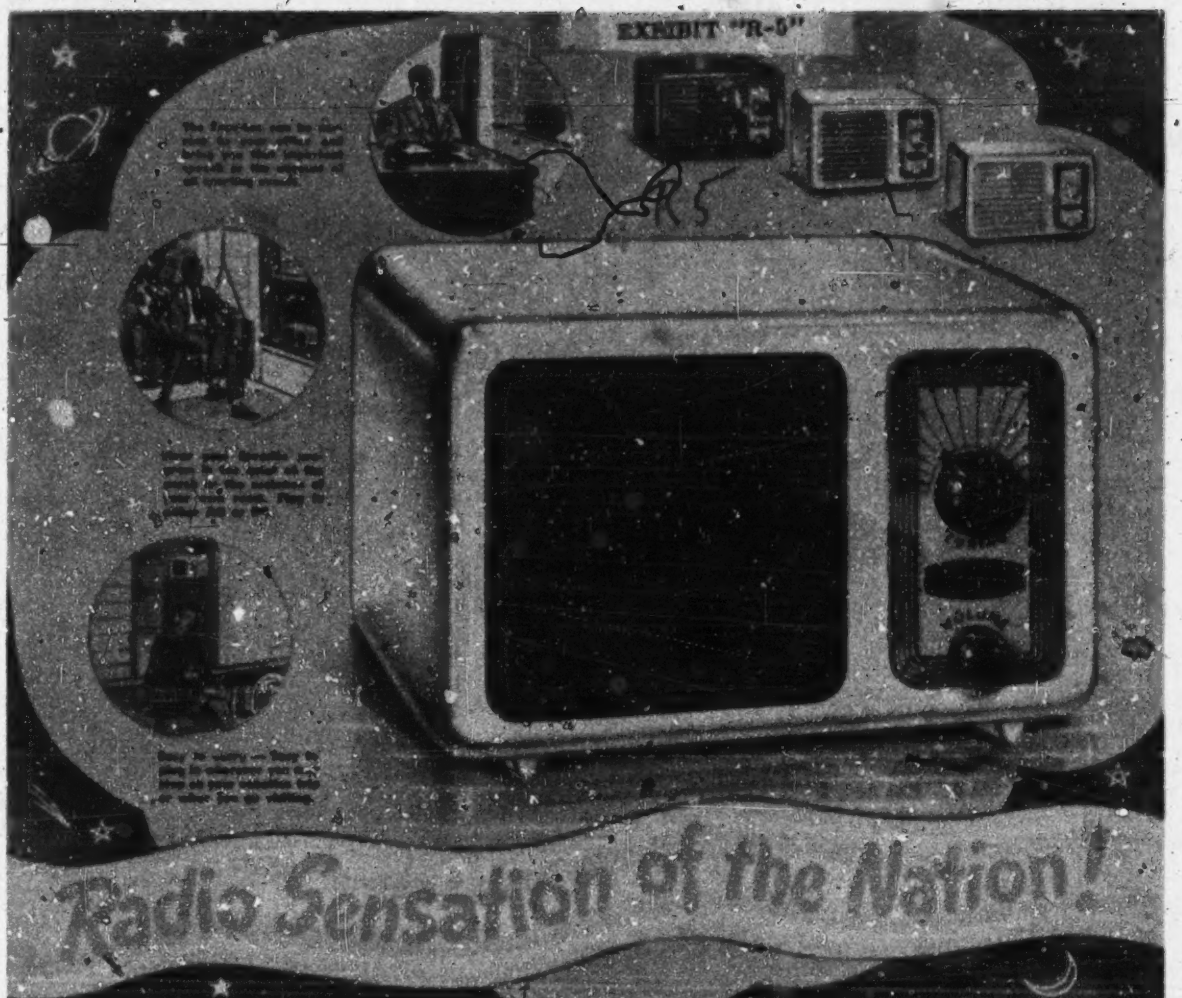


EXHIBIT "R-4"
PERRY SALES COMPANY
412 S. Jefferson St.
Chicago 7, Ill.
7e

EXHIBIT "R-5"



Radio Sensation of the Nation!

A SELECTIVE, POWERFUL PRECISION SET WITH A MARVELOUS TONE

Famous TRAV-LER Superheterodyne Radio

WITH NEW EASY-TO-CARRY CASE

- Improved circuitry for unrivaled [illegible] power and purity of tone.
- Two [illegible] assure the best possible [illegible].
- Tone valves with two dual purpose tubes.
- Beautiful plastic cabinet in [illegible] color combinations to suit [illegible].
- [illegible] Dynamic, [illegible] electrically to give [illegible] clear, natural tone.
- The only radio made for longer life and dependability.
- Full broadcast range, over 550 to 1650 kilocycles.
- Illuminated tuning [illegible].
- Shadow-Vision [illegible].
- Improved.
- Genuine Alnico V, permanent magnet dynamic speaker.
- [illegible] full vision dial.
- Plastic covered [illegible] antenna.
- Electrical [illegible] 105-125 volts A.C. or D.C. [illegible].
- Easy tuning [illegible] for non-musical persons.

Built [illegible] The radio with everything for perfect tone. Has [illegible] tone. A fine, powerful radio at [illegible] priced into the medium market. This famous Trav-Ler Radio is [illegible] engineered and precision built to stand up and deliver the finest type of radio reception. The powerful R.C.A. licensed AC-DC chassis is housed in a smart cabinet. Lightweight and compact so that you can just pick it up and go, open to the closed [illegible] position. Has [illegible] and [illegible] tone. Has not only the [illegible] sensitivity of [illegible] but also the [illegible] tone quality. The [illegible] of the radio [illegible] may be [illegible] to [illegible], with the [illegible] [illegible] [illegible] radio. Tunes [illegible] standard broadcast [illegible] R.C.A. [illegible] Dynamic speaker. Volume [illegible]. Plays [illegible] like a lamp. Your choice of colors to match any color scheme—red, blue, maroon or ivory.

Not a Midget . . BUT A MEDIUM SIZE TABLE MODEL . .

77

PERRY SALES COMPANY
417 S. Jefferson St.
Chicago 7, Ill.

EXHIBIT "C"

1

7g

13

EXHIBIT "C-1" 1-2

Perry SALES COMPANY

417 S. JEFFERSON STREET
CHICAGO 7, ILLINOIS

YES, YOU CAN RECEIVE A NEW CINEX DELUXE CAMERA--AS A GIFT TAKE COLOR OR BLACK AND WHITE PICTURES

Here's how easily and quickly you can get your fine CINEX DELUXE CAMERA PRACTICALLY AS A GIFT. Merely show the illustrations to your friends, relatives, neighbors and co-workers. Read all the features described on the enclosed folder. Explain to them how they may obtain one of these CINEX DELUXE CAMERAS for as little as 1¢ and not more than 24¢.

The enclosed sales card has a list of girls' names and under each seal is a number. For example - Person selecting No. 1 pays 1¢; No. 5 pays 5¢; No. 9 pays 9¢; No. 12 pays 12¢; No. 16 pays 16¢; all others pay only 24¢. NONE HIGHER! Numbers are not consecutive.

SIMPLE, ISN'T IT? SO, WHY DELAY? TAKE ADVANTAGE OF THIS UNUSUAL OFFER TO OWN A CINEX DELUXE CAMERA!

How to send for your CAMERA! Fill out the enclosed order form. Immediately upon receipt of the order, we will rush to you 2 CINEX DELUXE CAMERAS and 1 14 Inch All American Collapsible Telescope.

EXTRA GIFT FOR YOU! A Carrying Case for your camera will be included if the order is received in 15 days.

We know when you receive your new CINEX DELUXE CAMERA you'll treasure it for the thrills and pleasure it will give you when you see the sharp, clear black and white and color pictures it takes. And you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY

P.S. If you are unable to take advantage of this offer we would appreciate your co-operation in turning the enclosed over to a friend. THANK YOU!

7h

EXHIBIT "C-2"

LUCKY NAME UNDER SEAL RECEIVES THIS
Cinex De Luxe
CANDID CAMERA
YOU CAN TAKE PHOTOS IN BLACK AND WHITE AND
COLOR
No. 1 pays 1c
No. 5 pays 5c
No. 9 pays 9c
No. 12 pays 12c
No. 16 pays 16c
All others pay only 25c
NONE HIGHER
ADA AMY ANN JOY EDA EVE
FAR FLO IDA INA JEN JOY
KAY LIL LOU MAE MIN NAN
PEG SAL SUE VEE VIV
Do not remove seal until entire card is sold
NO. 19 RECEIVES COLLAPSIBLE TELESCOPE OPENS TO 14 INCH LENGTH
QUALITY FEATURES
GENUINE MAESTAR LENS AND FAST SHUTTER
EYE LEVEL VIEW FINDER merely sight and snap. Fixed focus snapshot and time exposure. Takes 16 pictures. Fully guaranteed. Modern, streamlined plastic case. Uses Eastman 127C Kodacolor Film for color pictures. Uses Eastman 127 or Ansco AB for black and white pictures.
PUSH OUT WITH PENCIL WRITE YOUR NAME ON REVERSE SIDE OPPOSITE NAME YOU SELECT

7i

15

EXHIBIT "C-3"

1031 V

Use This Order Blank

PERRY SALES COMPANY

417 S. Jefferson St., Chicago 7, Ill.

PLEASE SHIP AT ONCE TO

Name _____

Address _____ Zone _____

City _____ State _____

2 CINEX DE LUXE CAMERAS

and ONE Collapsible Telescope

TTANCE ENCLOSED

- ☐ $4.99 PAYMENT IN FULL
- ☐ $1.00 DEPOSIT, BALANCE C.O.D.
- ☐ SHIP C.O.D. FOR FULL AMOUNT

Extra Gift

If you send your order in 15 days, you receive a

CARRYING CASE

With Shoulder Strap
FOR YOUR CINEX CAMERA

Mark X here ☐ If you are to receive carrying case.

NOTICE — If you enclose cashier's check or money order in full, you save paying C.O.D. fees and we prepay all shipping charges.

EXHIBIT "C-4"

[redacted]

[redacted]

[redacted]

7K

EXHIBIT "C-5"

Victory Model

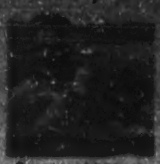
TAKES PICTURES IN COLOR AND BLACK AND WHITE

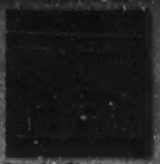
How Cinex-V Candid Camera Brings You Easy-to-Take Black and White or Color Snapshots

YES—Now you can take pictures in *NATURAL COLOR* as easily and quickly as you ever took black and white snapshots . . . at lower cost than ever before with the sensational Cinex-V Victory Model Candid Camera. Natural color is the newest craze in the photographic world—and why not? Color is everywhere. Preserve it in all its natural hue with the perfect color prints you get with the remarkable Cinex-V and Eastman Kodacolor 127C Roll Film. And, remember, Cinex-V also takes regular black and white snapshots with amazing clarity and sharpness of detail. Snapshot time in all the time—365 days a year—and you should have a camera—but when you get one—get a good one—the new Cinex-V Victory Model.

THESE QUALITY FEATURES MEAN BETTER PICTURES

- ★ Takes roll color pictures with Eastman Kodacolor 127C Roll Film
- ★ Also takes regular black and white photos with Kodak 127 or Ansco 42.
- ★ Genuine Victory lens
- ★ "Spyglass" eye level view finder—shows right and wrong
- ★ Snapshot or time exposure adjustment
- ★ Advanced design shutter with lightning fast shutter





8 In the United States District Court

No. 211 Criminal T

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

PERRY HALSETH, *Defendant*

OPINION—Filed April 3, 1951

The defendant Perry Halseth was indicted and charged with having violated former Section 336, Title 18, U.S.C., which is now Section 1302, Title 18, U. S. C. The indictment contains eight counts. The first count of the indictment reads as follows:

"The Grand Jury charges:

"That on or about the 1st day of June 1948, at Green Bay, Brown County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court,

PERRY HALSETH,

knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided."

Each of the remaining seven counts is similar except that each count names a different person as the recipient of a circular letter and specifies the date of the receipt and the place where the circular was received.

The defendant has moved for an order dismissing the indictment, as a whole and on every count thereof. For the purpose of the hearing on this motion of defendant, the parties stipulated
9 to certain facts. They submitted as exhibits copies of the material referred to as circular letters in the various counts of the indictment, and it was agreed that the defendant did cause to be delivered, by mail, the circular letter thus described, to the person named in each count at or about the date indicated.

An examination of these exhibits discloses that Perry Halseth caused to be delivered to the persons named in Counts 1, 2, 7, and 8 the following material. There was a sheet of paper containing the letterhead "Perry Sales Company, 417 S. Jefferson Street,

Chicago 7, Illinois" and under this was printed the following message:

"FOR YOU—A NEW PERSONAL SUPERHETERODYNE RADIO AS A GIFT—

You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. *The quality features are described on the enclosed folder.*

It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.

The enclosed sales card has a list of names and under each seal is a number. For example—Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

Take ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you TWO (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

10 EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

FERRY SALES COMPANY.

P. S. Should you be unable to take advantage of this offer, we would appreciate your co-operation in turning the enclosed over to a reliable friend. THANK YOU!

The circular referred to in this printed message was a colored illustration and printed matter extolling the beauty and quality of a "medium size table model" radio. The sales card referred to was [illegible] commonly known as a punch board. It also featured a picture of the same radio portrayed in the circular. The card also [illegible] the following printed message:

"Lucky name under seal received a —— —— radio. Choice of 4 colors. No. 1 pays 1¢ No. 6 pays 6¢ No. 11 pays 11¢

No. 21 pays 21¢ No. 31 pays 31¢ All others pay only 39¢ NONE HIGHER!

There was then a short summary of the virtues of the radio. The front side of the card also contained this message:

"3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value"

The face of the card revealed one larger size semi-perforated circle within which was printed: "Do not remove seal until entire card is sold", and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these, this message:

"This card contains eighty names. No. 1 pays 1¢, No. 6 pays 6¢, No. 11 pays 11¢, No. 21 pays 21¢, No. 31 pays 31¢, all others pay only 39¢. NONE HIGHER. This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

TOTAL $29.95

POSTMASTER: This parcel may be opened for postal inspection if necessary."

Along with the aforementioned material, the persons named in the indictment received an order blank for the two radios and three ball-point pens and a printed return address envelope.

The persons named in Counts 3, 4, 5, and 6 of the indictment received similar material, except that the merchandise featured was a candid camera.

The defendant listed six grounds for his motion and at the oral hearing on the motion raised three additional objections to the indictment. The nine grounds thus put forward by the defendant may, for the purpose of discussion, be roughly classed into three groups and the defendant has adopted this classification in his briefs on the motion. The first major classification raises the question of whether on the face of the indictment an offense is charged. The second group alleges that if the indictment were informative and alleged the additional facts contained in the stipulation, no proscribed act would have been established. The third group of objections to the indictment rests on technical grounds. Because it seems to this court to be the decisive issue, the court

shall first consider the second question of whether a proscribed act has been established.

12 Accepting the stipulation as revealing the full facts in regard to the mailing, we see that the defendant was engaged in the sale of merchandise to individuals and that to further his undertaking, he was encouraging and promoting the use of punch boards by these individuals. The government has charged that the defendant's use of the mails in this respect constitutes a violation of law.

Former Section 336 of Title 18, U.S.C., which was in force prior to September 1, 1948, the effective date of the new Criminal Code provided in part:

> "No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * shall be deposited in or carried by the mails * * * Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *"

The present Section 1302 of the new Title 18, U.S.C., provides in part:

> "Whoever knowingly deposits in the mail, or sends or delivers by mail, Any letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * Shall be fined * * * or imprisoned * * *"

It is the position of the defendant that under either of the above statutes there can be no crime unless at the time the circular is mailed there is a lottery or similar scheme in existence or at least definitely set up. In support of his contention he cites several cases. The strongest of these is the case of *United States v.*

13 *Irvine, et al*, 156 Fed. 376. This case arose under a statute which was essentially similar to that now under consideration. The defendant was charged with having mailed an advertisement of a lottery and demurred to the indictment. The court quoted from the opinion in *United States v. Bailey*, 47 Fed. 117:

> "I do not think this indictment defective for failing to show how and in what manner the circulars set forth in the several counts concern a lottery. It is sufficient, in my opinion, to charge in the words of the statute the fact that they do concern a lottery, without setting forth the evidence going to show that fact. But I think the indictment defective, because it fails to aver the existence of any lottery, or of an intention to

hold any lottery or drawing for prizes to which the circulars set forth relate. The circulars upon their face do not show that they concern or in any way relate to a lottery. In such a case, the existence of a lottery, or of a scheme for a lottery, or of an intention to hold some lottery or drawing for prizes, to which the circulars relate, must be proved by other evidence than the circulars themselves. The fact should therefore be averred."

The court sustained the demurrer to the indictment in the Irvine case since it found that the indictment did not allege the existence of the lottery. The court said:

"* * * It is essential therefore that the existence must be alleged, as it must be proven to establish the offense. * * *"

The government has cited the case of *Boasberg v. United States*, 80 F. 2d 185 as authority for the proposition that the lottery or similar scheme need not be in existence at the time that the mailing of "a circular letter concerning a lottery or scheme" takes place. I have carefully studied the Boasberg opinion and I fail to find such an implication in its language. In that case the indictment charged that the defendant had mailed—

"'a circular and advertisement concerning a scheme offering prizes dependent upon lot or chance similar to a lottery addressed to George M. Carnes, etc., reading as follows: 'Suburban Gardens Will Inaugurate a New Innovation for the Better People of New Orleans Keno $100.00 or More to the Winner Every Roll Commencing February 5th, 1930. Doors open at 6:30 P.M., first game at 7 P.M. M. Boasberg.'"

The defendant was found guilty by a jury and he appealed. The appellate court first discussed the question of whether testimony that keno was usually played as set forth in the indictment was properly admitted. Then the court discussed the question of whether the indictment sufficiently described the scheme which the circulars concerned. Finally the court considered what it said was the real question in the case—whether a scheme to run keno games is a scheme offering prizes dependent in whole or in part upon lot or chance and similar to a lottery or a gift enterprise. The court decided each of the issues adversely to the defendant. The government in this case argues that the Boasberg case demonstrates that the statute can be violated although the scheme offered prizes dependent upon lot or chance is to take place in the future. It must first be said, I think, that the Boasberg opinion does not discuss this question. Secondly, I feel that there is a substantial difference between the Boasberg case where the defendant who

did the mailing had plainly indicated his intent to personally operate such a scheme and the instant case where the defendant who did the mailing could at best only hope that the punch boards would be used as he desired. I do not find that the Boasberg case lends any support to the position of the government in the case at bar.

The defendant in further support of his position that the existence of a lottery is an essential element of the crime which he is charged with having violated, cites the case of *Stockton v. United States*, 205 F. 462. The opinion in the Stockton case was written by Judge Geiger of this court sitting as a circuit judge. The statute involved was a companion statute to the one in question. It provided in part:

> "'Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States,'" etc.

The indictment charged the defendant with having mailed a catalogue advertising such gambling devices as marked cards and loaded dice to a prospective purchaser of such equipment. The court held that assuming the marked cards and loaded dice were to be used by the purchaser to cheat or defraud in gambling nevertheless the seller did not violate the statute by sending the catalogue through the mail. The government in that case alleged that the defendant intended to induce one Moore and one Nichols to purchase gambling apparatus from him by sending them the catalogues, and that the defendant intended that said Moore and Nichols engage persons at play and defraud them. The court said:

> "* * * Now, if plaintiff in error had, through personal solicitation, sold or offered to sell this apparatus to Moore and Nichols; or if they had called at his place of business and entered into and concluded negotiations with him, there would in each case be present every element disclosed in the indictment. The *mailing* of the catalogue is not an element of the scheme; the arbitrary allegation of the intention of plaintiff in error that Moore and Nicho would engage persons in play, etc., is in effect an allegation of knowledge on his part that such purchasers would put the apparatus to a use for which it was obviously intended—and it adds and can add nothing unless and until by appropriate averment of facts it appears

that he was to be in some relation of confederacy or par-
16 ticipation, beneficial or otherwise, in such use. The real scheme or artifice to *defraud*, if any, is that devised and perpetrated by the possessors of the apparatus when they use it. The actual intent of the plaintiff in error was coextensive only with his transaction in selling or offering to sell;—and in case he sold—the subject-matter being disclosed and known—his whole intention and expectation would have been fully realized. His relation to the matter would have been at an end; and, granting that Nichols and Moore would or might defraud persons as alleged in the indictment, they would not do so upon the prompting nor in obedience to any act or intention of the plaintiff in error. * * *"

This language is applicable to the case at bar. There would be no lottery or scheme offering a prize dependent upon lot or chance unless the purchasers put the punch boards to use. While it is obvious that the defendant hoped and perhaps even had good reason to believe that the punch boards would be put to use, this hope or belief that there would be a "scheme" in existence does not make the mailing of the circulars in this instance a violation of the statute.

Still further evidence of the fact that the statute, properly construed, does not prohibit what this defendant has done is apparent from an examination of the legislative history of attempts to amend the statute. Thus, the record of a hearing before a subcommittee of the Committee on Post Offices and Post Roads of the United States Senate held on April 21, 1932 indicates the Post Office Department was then, and had for many years been sponsoring legislation to strengthen the anti-lottery laws to prohibit such mailing as that now in question. Quoting from that record we repeat the testimony of Mr. Calvin W. Hassell of the Post Office Department in support of S. 182, a bill to amend Title 18, Sec. 336, U.S.C. (the statute involved in the instant case):

17 "Mr. Hassell. Legislation similar to that proposed in this bill, with the exception of the words referred to in this letter the chairman has just read, has been recommended by the Post Office Department for a great many years. The necessity for this legislation comes about by reason of the fact that the present lottery statutes, which are very broad when considered in connection with going lottery schemes, does not cover lottery devices and advertisements thereof.

"That came about by reason of the decision of the Supreme Court of the United States in France v. United States, in 1895 (164 U.S. 676), holding that matter relating to lotteries not set up and in operation was not within the lottery statutes.

"The provision with respect to cheating gambling devices is necessary by reason of the decision of the circuit court of appeals for the seventh circuit, in the case of Stockton v. United States, decided in 1913, in 205 Fed., 462. In the Stockton case, the purveyor of cheating-gambling devices through the mails was prosecuted under the fraud statutes (18 U.S. Code, 338), and his conviction was reversed by the circuit court of appeals, which held that the sale through the mails of cheating-gambling devices did not come within the purview of the postal fraud statute.

"The department has had a great many inquiries from individuals as to why the laws are so strictly enforced with respect to the transmission of matter through the mails relating to going lottery schemes, and yet lottery devices, including all of the prizes to be awarded, are mailable under the present law.

"Senator Frazier. It is the opinion, then, of the department that something of this kind is necessary to bar this so-called gambling paraphernalia from being eligible to the mails?

"Mr. Hassell. Yes, Senator.

"Senator Sheppard. And literature and letters regarding it.

"Senator Frazier. Yes."

The history of the administration of this statute indicates that while the statute itself (former Title 18, U.S.C., Section 336) declared that material concerning lotteries or gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance shall not be deposited or carried in the mails or delivered by any postmaster or letter carrier, the Post Office Department has not seen fit to apply the statute to the type of material involved in the instant action.

In the light of all of this background, the prior court decisions and the legislative and administrative history, I feel that the court cannot now find that the statute applies to the type of material sent by the defendant without, in effect, rewriting the statute. This would be obviously improper because it is fundamental that it is to the Congress and not the courts to which we must apply for changes in our Federal laws. Justice demands that a change in the law be announced by Congress so that the citizenry will know what they must do or not do in the future. To say that this indictment charges an offense is, in effect, therefore to enact an ex post facto law. This we will not do.

Ordinarily this opinion would now be concluded by setting forth the mandate of the court. However, the implications of this opinion constrain me to make one final observation.

In the promotion of his merchandise sales this defendant makes a well calculated appeal to the gambling instincts of his prospective purchasers through the enclosure of the device with which each could conduct a little game of chance. This sort of appeal, I presume, finds some acceptance among people of every kind and description, but I venture the opinion that the great majority of the punch boards that are actually used are those which fall into the hands of children of tender ages. The serious moral implications involved are too apparent to require laboring on my part.

The postal authorities have been fully aware of this evil and have repeatedly asked Congress to plug the loopholes exposed by earlier court decisions, but Congress has not yet seen fit
19 so to do.

During these past few months the Congress, through a committee of the Senate has been making an investigation of gambling, and other types of vice with the end in mind of the enactment of Federal legislation to deal with this problem. The state of the law relative to the use of the mails for distributing devices which are designed for gambling uses should be referred to if it already has not. The tremendous impact of the revelations of the Committee upon the citizens of this country has created a climate insuring passage of wholesome legislation designed to stop these evil practices.

The motion of the defendant will be granted. Counsel for the defendant will submit an order in conformity with this opinion.

Dated at Milwaukee, Wisconsin, this 3rd day of April, 1951.

ROBERT E. TEHAN.

[File endorsement omitted.]

20 IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO DISMISS—Filed April 4, 1951

The motion of the defendant herein for an order dismissing the indictment herein as a whole and on every count thereof, separately and severally, having duly come on for hearing before this Court, and the Court having heard oral argument and studied the written briefs in record herein, and having rendered an opinion granting the motion,

IT IS ORDERED that the indictment herein as a whole and on every count thereof be and it is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 4th day of April, 1951.

(S.) ROBERT E. TEHAN,
United States Judge.

[File endorsement omitted.]

21 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

1949		
May	9	Bill of Indictment, filed.
"	"	Order for warrant of arrest and fixing bail in the sum of $10,000.
"	"	Warrant of arrest issued.
"	13	Warrant of arrest returned executed May 13, 1949.
"	"	Appearance bond of deft. in the sum of $7500 with cash bail, filed.
July	12	Motion of defendant for an order dismissing the indictment, with notice, filed.
"	25	Stipulation in re motion of defendant to dismiss indictment, filed.
"	"	Hearing on motion of deft. to dismiss indictment—taken under consideration.
Sept.	14	Transcript of proceedings upon motion of defendant to dismiss indictment, filed.
1951		
Apr.	3	Opinion of the Court on motion of the deft. for an order dismissing the indictment—granting said motion and directing attorney for defendant to submit an order in conformity with the opinion, filed.
"	4	Order dismissing indictment.
"	"	Notice to parties of entry of order dismissing the indictment, filed.
"	"	Order for return of cash bail in the sum of $7500.00 to Bruno V. Bitker, Attorney for defendant.
May	2	Notice of Appeal of U. S. of America, plaintiff appellant, in duplicate, filed.
"	"	Statement as to jurisdiction of the U. S. Supreme Court, in duplicate, filed.
"	3	Duplicate notice of appeal of U. S. of America, plaintiff appellant, together with statement of docket entries forwarded to Clerk, U. S. Supreme Court, Washington, D. C.
"	"	Notification to appellee of appeal taken by the United States, filed.
"	18	Statement opposing jurisdiction and motion to affirm or dismiss, filed.
"	22	Designation of contents of record on appeal, filed.

22 In the United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed May 2, 1951

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Eastern District of Wisconsin, entered April 4, 1951, dismissing the indictment charging the defendant with violations of 18 U.S.C. (1946 ed.) 336.

Dated May 2, 1951.

(S.) PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.

[File endorsement omitted.]

23 Notification to Appellee Under Rule 12 (Omitted in Printing).

24-25 Designation of Record on Appeal (Omitted in Printing).

26 Designation of Additional Contents of Record on Appeal (Cmitted in Printing).

27 Clerk's Certificate to foregoing transcript omitted in prnting.

28 In the Supreme Court of the United States, October Term, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DISIGNATION OF RECORD—Filed June 13, 1951

Pursuant to Rule 13, paragraph 9 of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that the mailing of a punch board and circular carrying an illustration of merchandise to be won as prizes and a description of how such merchandise could beobtained through use of the punch board to sell chances, did not constitute mailings "concerning any lottery" within the intendment of Section 213 of the Criminal Code (now 18 U.S.C. 1302).

2. The District Court erred in holding that, under the scheme for selling merchandise through use of the punch boards to sell

chances, no lottery came into existence until the person to whom the punch board was mailed put it to use.

3. The District Court erred in granting the motion to dismiss the indictment.

Appellant deems the entire record, as filed in the above-entitled case, necessary for the consideration of the points relied on.

June 13, 1951.

PHILIP B. PERLMAN,
Solicitor General.

[File endorsement omitted.]

29 Supreme Court of the United States, October Term, 1951

No. 91

[Title omitted]

ORDER—OCTOBER 8, 1951.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 971678 915